

SERVED: January 16, 1996

NTSB Order No. EA-4416

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 2nd day of January, 1996

DAVID R. HINSON,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-13943
v.)	
)	
ARTHUR F. PRIOR,)	
)	
Respondent.)	
)	

OPINION AND ORDER

Both the Administrator and the respondent have appealed from the oral initial decision of Administrative Law Judge William R. Mullins, rendered at the conclusion of an evidentiary hearing on April 27, 1995.¹ By that decision, the law judge reduced the period of suspension from 365 to 40 days, after finding that the

¹An excerpt from the hearing transcript containing the initial decision is attached.

Administrator failed to prove all the allegations in the suspension order (complaint). Specifically, he dismissed the violations of sections 91.119(a) and (b) of the Federal Aviation Regulations ("FAR," 14 C.F.R. Part 91) and upheld only the violation of 91.13(a).² As discussed infra, we grant the Administrator's appeal and deny the respondent's appeal.

The underlying facts are as follows. On Sunday, February 28, 1993, respondent acted as pilot-in-command of an Aerostar International S-61A hot air balloon, on a passenger-carrying flight which took off near San Marcos, California. Respondent testified that before taking off, it appeared that the wind would carry the balloon west, away from the town of Escondido. After the balloon was launched, however, the winds shifted and the

²The regulations read, in pertinent part:

§ 91.13 Careless or reckless operation.

(a) Aircraft operations for the purpose of air navigation. No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

§ 91.119 Minimum safe altitudes: General.

Except where necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:

(a) Anywhere. An altitude allowing, if a power unit fails, an emergency landing without undue hazard to persons or property on the surface.

(b) Over congested areas. Over any congested area of a city, town, or settlement, or over any open air assembly of persons, an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet or the aircraft.

balloon began to drift toward the City of Escondido. He tried several different altitudes, but there was no change.

Respondent first landed in an empty parking lot near the intersection of Rock Springs Road and Mission Avenue in Escondido sometime after 8 a.m. to exchange passengers. Escondido Police Officer Dana Gravette observed the landing and testified that the balloon, which she had seen "flying at low altitude throughout the morning," approached the intersection at an altitude of about 500-600 feet, and landed less than 50 feet from a building, 30 feet from power lines, and less than 50 feet from light poles. (Transcript (Tr.) at 34-36, 44.) The parking lot where the balloon landed was less than 70 feet wide and located in the City of Escondido, in a populated area, where there are several businesses.³ (Tr. at 33, 39, 46.) A few cars were proceeding through the intersection at the time and they slowed down as the drivers watched the balloon. (Tr. at 31.)

After exchanging passengers, the balloon took off, traveling again over the City of Escondido. Police Officer Ben Martinez testified that he saw the balloon, just over the trees, descend near the intersection of Third Avenue and Juniper Street in a busy area of Escondido. It landed in a 40-foot wide parking lot, within 50 feet of power lines, 15 feet from trees, and 15 feet from a building. (Tr. at 53, 66.) Pedestrians had gathered and there were several vehicles on the two busy streets. After

³An FAA inspector testified that he measured the parking lot and its dimensions were 66 feet by 177 feet. (Tr. at 92.)

respondent exchanged passengers, the balloon took off again. Officer Martinez estimated that the balloon was about 500 feet from the highest obstacle when it reached level flight. (Tr. at 62.) Respondent next attempted another landing, ascended again, and ultimately landed outside the city line. Officer Martinez stated that respondent was issued a citation for (and pleaded guilty to) violating a city ordinance which prohibits taking off or landing aircraft in the City of Escondido without authorization from the chief of police.

An FAA inspector/safety program manager testified that the landings within the City of Escondido and their concomitant takeoffs were, at minimum, careless because both sites were in congested areas and dangerously close to power lines. He opined that, unless respondent was experiencing an emergency, he should not have landed at or taken off from those locations.⁴ He concluded that respondent's low flight was not necessary for takeoff or landing.

Respondent admitted that he flew less than 1,000 feet over the highest obstacle but insists that his actions were necessary for takeoff and landing. He asserted that the areas where he landed were not congested at that time of day and, in any event, balloons should be judged by a different standard than fixed-wing aircraft because, in a balloon, a loss of power at a *higher* altitude is actually more dangerous to the balloon occupants than

⁴Respondent did not assert that an emergency situation had occurred.

a loss of power at a lower altitude. This position was corroborated by the testimony of another veteran balloon pilot, who testified that respondent's landing sites were appropriate, given that the winds were only 1-2 knots. (Tr. at 194.) Respondent further contended that the only time he was below 1,000 feet was when it was necessary for takeoff or landing. As an experienced balloon pilot, he argued, he had the skill to land and take off at the sites he chose, as evidenced by the fact that no one was injured and no property was damaged.⁵

After hearing the testimony and reviewing the evidence, the law judge determined that FAR sections 91.119(a) and (b) were inapplicable to this case, apparently concluding that if the respondent believed he had an adequate reason for landing where and when he did, then those landings were "necessary," and, therefore, could not violate the regulation.⁶ The law judge did,

⁵Respondent stated that the balloon pilot should have the unbridled autonomy to determine whether a site is appropriate for landing at that moment. He further testified that

I had always been under the impression up to this time that the FAA was wise enough to let [the balloon pilot] have this authority to make that decision without interfering with that authority by holding the pilot responsible for the results of that decision. If that landing was a safe landing and everyone was okay, then his site selection decision was a good decision. If an accident occurred he, perhaps, made a poor decision and he could then be reviewed by the FAA to determine if he was careless or needed to get better pilot skills.

(Tr. at 156.)

⁶The law judge stated, "I'm going to find in this case today that it was necessary for you to land at those areas, that you made a determination that it was necessary and therefore, the -- that portion of the applicability of FAR 119(a) and (b) just

however, find that respondent violated section 91.13(a) by landing in the City of Escondido in deliberate violation of a city ordinance. He reasoned that respondent's actions precipitated a dangerous situation with regard to the third landing because the police, in the performance of their duties, detained the chase crew while respondent was attempting to land.

Based on our review of the transcript, briefs, and evidence, we are obliged to reverse the initial decision and constrained to express some dismay with the law judge's apparent disregard for the ample Board precedent on the issues presented in this case. The application of the language in section 91.119 (formerly 91.79) regarding low altitude flight that is "necessary for takeoff and landing" is well-established. For example, in the case of Administrator v. Cobb and O'Connor, 3 NTSB 98, 100, aff'd, 572 F.2d 202 (9th Cir. 1977), which was cited by the Administrator during closing argument, two pilots were found to have operated two fixed-wing aircraft within 500 feet of obstacles on the ground over a sparsely populated area and then landed on a taxiway. The Board, after concluding that the respondents exercised poor judgment in choosing a landing site that necessitated low flight over buildings, power lines, cars, and people, stated:

We cannot accept respondents' proposition that the low altitudes at which their aircraft were operated were excused by the prefatory clause of section 91.79. As the law judge
 (...continued)
 doesn't apply in this case." (Initial Decision at 233.)

He did not address the subsequent takeoffs.

stated, respondents' interpretation of the above regulation would in effect excuse low flight where necessary for 'any takeoff or any landing from any area anywhere at any time.'

Such an interpretation is patently fallacious in that it would excuse low flight regardless of the appropriateness of the landing site.

Id. at 100 (citation omitted). Similarly, in Administrator v. Kittleson, NTSB Order No. EA-4068 (1994), the Board discussed when low flight was "necessary for takeoff and landing" under section 91.119(c):

[R]espondent could not simply choose any takeoff route or time and call it necessary. He must make a reasonable, appropriate choice, or the regulation has no meaning. Administrator v. Lewis & Lewis, 3 NTSB 878 (1978). We, thus, reject respondent's contention that the rule does not apply simply because he was conducting a takeoff.

Id. at 4.

In the context of balloon flight, we refer to Administrator v. Rees, 4 NTSB 1323 (1984). In Rees, the respondent's commercial pilot certificate was revoked for violations of sections 91.119(a), (b), and (c), and 91.13(a)⁷ in connection with four incidents of operating a hot air balloon in low flight.

We determined that the appropriateness of the landing site, "in terms of the necessity for landing there," is part of the equation when evaluating a pilot's landing choices. Id. at 1324.

Similarly, in Administrator v. Cory, 6 NTSB 536 (1988) (60-day suspension), the respondent operated a balloon in low flight over residences and other structures and landed in a parking lot near cars and light poles. The Board found that the law judge correctly considered the suitability of the landing site in his

⁷Then cited as sections 91.79(a), (b), and (c) and 91.9.

analysis when he concluded that respondent's low flight was not necessary for landing. If the landing site is inappropriate under the circumstances, then the low flight cannot be excused under the regulation as necessary for landing.⁸

While in the instant case, the Administrator does not address head-on the issue of other appropriate landing sites, the facts as established indicate that respondent's third landing, effected outside the City of Escondido, took place in an area that was significantly less congested than the areas of the first two landings.⁹ Therefore, respondent certainly had the option to refrain from landing in the City of Escondido and, instead, land the balloon in a more suitable location.¹⁰

⁸See Administrator v. Van De Hoef, 5 NTSB 1050 (1986), aff'd, 850 F.2d 629 (10th Cir.), where a balloon pilot was found to have operated above a congested area below an altitude of 1,000 feet above the highest obstacle. Specifically, he operated the aircraft over Seattle, Washington, and landed in a northwest suburb of the city. We agreed with the law judge that both the takeoff and landing sites were inappropriate and, thus, did not involve permissible low flight. Id. at 1052. Just as in the instant case, while the low flight may have been a prerequisite to the questioned landing, that landing itself was inappropriate. The Board upheld a 90-day suspension of the respondent's commercial pilot certificate.

See also Administrator v. Willauer, NTSB Order No. EA-3944 (1993), another balloon low flight case, where, citing Cory and Rees, supra, we noted, "Board precedent is clear that the prefatory language of 91.79 will not serve to excuse a pilot unless the evidence establishes that the chosen landing site was suitable." Id. at 7. Sanction was waived under the provisions of the Aviation Safety Reporting Program.

⁹Respondent testified that the balloon went over some fields and a sparsely populated residential area. (Tr. at 157.)

¹⁰See Rees, supra, at 1324, where we stated,

[W]e think it clear that the law judge's conclusion

Given the facts as established by the testimony of the two police officers, the FAA inspector, and respondent himself, the two landings in the City of Escondido occurred in congested areas that, based on Board precedent, were not appropriate for takeoff or landing. Both landing sites were unsuitable due to their close proximity to power lines, buildings, and trees and the availability of alternative sites.¹¹ Respondent was not faced with an emergency situation, but instead was anxious to please his customers and provide each with a 30-minute balloon ride. As such, the low flights were not necessary for takeoff or landing, within the meaning of the regulation.

Respondent's argument that section 91.119 should not apply to balloons was squarely addressed in Rees, supra, at 1325, and is not, as respondent contends, "being newly applied to balloons." (Respondent's Reply Brief at 5.) In Rees, the Board agreed with the Administrator's interpretation that a balloon's heater is its "power unit," the failure of which is addressed in

(..continued)

that these sites were inappropriate is based not 'solely' on the fact that they were within congested areas, but also on the availability of alternative sites respondent could have employed which, not being within congested areas, would not have entailed the risks to persons and property below that these landing sites, close to residences and power lines, posed and that the regulation is intended to minimize or avoid.

¹¹That the Administrator did not offer definitive evidence of the wind speed at the time of the landings or takeoffs is inconsequential, given the apparent unsuitability of the sites for takeoff and landing.

section 91.119(a).¹² We rejected the argument in Rees that, because balloons have less lateral control over where they will land if a heater fails, the regulation does not apply to balloons.¹³ Moreover, FAR section 91.119(a) seeks to minimize the hazard an aircraft's low flying poses to persons and property "on the surface," not to those in the aircraft.

Based on the foregoing, we will uphold the Administrator's order alleging that respondent violated FAR sections 91.119(a), (b), and 91.13(a) through the two landings and takeoffs within the City of Escondido.¹⁴ Regarding sanction, the Administrator

¹²Unlike the situation for helicopters, section 91.119 does not contain a specific exception for balloons.

¹³In disagreeing with the respondent's notion that the regulation does not apply to balloons, we noted,

The circumstance that a balloon has less lateral control following a power unit failure than other aircraft and thus would have less ability to avoid collision with persons or property on the ground in an emergency landing does not point to inapplicability of the regulation. It would suggest, rather, a reading that this regulation does not permit balloons to operate over any congested area at any altitude. We do not understand the Administrator to be urging such a view in this case.

Rees at 1325, n. 12.

¹⁴As to respondent's violation of the Escondido ordinance prohibiting landing an aircraft in the city without the consent of the chief of police, whether it, in and of itself, evidences careless operation is of no moment in the instant case, since the section 91.13(a) violation is residual to the other charges and, therefore, established.

Also, given our disposition of the case, we need not address the issue of whether the law judge erred by allowing respondent to introduce into evidence unauthenticated videotapes of ballooning filmed at a location other than the ones at issue, with a different balloon, for the purpose of proving what types

originally sought a 365-day suspension, based on the incidents themselves and respondent's violation history. However, the paragraphs addressing respondent's violation history were withdrawn from the complaint by amendment dated April 7, 1995. Taking that into consideration, along with the sanction guidance table which recommends a 60 to 180-day suspension for low flight over a congested area, and the fact that there were two landings and two takeoffs in areas unsuitable for those purposes, we believe that a 300-day suspension of respondent's commercial pilot certificate is warranted.¹⁵

(..continued)

of balloon operation the FAA had condoned in the past. If it was error, because of doubtful relevance, it was harmless.

¹⁵On appeal, the Administrator first requested the reinstatement of a 365-day suspension (Administrator's Brief at 31, 43, 46), and then argues that a 300-day suspension is warranted. (Administrator's Brief at 44-45.) At the hearing, FAA Inspector Ballenger testified that he utilized the sanction guidance table and chose the maximum suspension for 1) landing or take off from ramps or other improper areas (recommended 30-120 days), and 2) failure to maintain required minimum altitudes over congested areas (recommended 60-180 days). He then added 65 days because it was a commercial operation, respondent acted in defiance of a local ordinance, the crew was inexperienced, and respondent had a violation history. (Tr. at 110.) Since the Administrator withdrew the references to respondent's violation history from the complaint and the maximum suspension was already being sought, we find that a 300-day suspension is justified, as argued in the Administrator's Brief at 44-45.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is granted;
2. Respondent's appeal is denied;
3. The initial decision is reversed;
4. The Administrator's order is affirmed, in part, consistent with this opinion; and
5. The 300-day suspension of respondent's airman certificate shall begin 30 days after service of this order.¹⁶

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT and GOGLIA, Members of the Board, concurred in the above opinion and order.

¹⁶For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to FAR § 61.19(f).